

RM-9082

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July 21, 1997

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

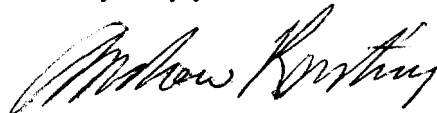
Re: Amendment of Section 73.202(b), Table
of Allotments, FM Broadcast Stations
(Tishomingo, Tuttle, Woodward, and Alva, OK)

Dear Mr. Caton:

Enclosed herewith on behalf of Chisholm Trail Broadcasting Co., Inc., licensee of Station KXLS(FM), Alva, Oklahoma, are an original and four copies of its "Reply to Opposition to Motion to Dismiss," filed in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,



Andrew S. Kersting
Counsel for
Chisholm Trail Broadcasting Co., Inc.

Enclosures
cc (w/ encl.): Certificate of Service

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations
(Tishomingo, Tuttle, Woodward,
and Alva, Oklahoma)

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MM Docket No. _____
RM- 9082

To: Chief, Allocations Branch

REPLY TO
OPPOSITION TO MOTION TO DISMISS

Chisholm Trail Broadcasting Co., Inc. ("Chisholm"), licensee of Station KXLS(FM), Alva, Oklahoma, hereby replies to the "Opposition to Motion to Dismiss," filed July 9, 1997 ("Opposition"), by Ralph Tyler ("Tyler"). In reply, the following is stated:

I.
Background

On March 21, 1997, Tyler filed a "Petition for Rule Making and Request for Issuance of Order to Show Cause," requesting that the Commission amend the FM Table of Allotments in the following manner: (i) delete Channel 259C3 at Tishomingo, Oklahoma, (ii) allot Channel 259C3 to Tuttle, Oklahoma, (iii) modify the license of Station KTSH(FM), Tishomingo, to specify Tuttle as its community of license, (iv) modify the license of Station KWFX-FM, Channel 260C1, Woodward, Oklahoma, to operate on Channel 292C1, and (v) modify the license of Station KXLS(FM), Channel 259C1, Alva, Oklahoma, to operate on Channel 260C1.¹

¹ Chisholm is the licensee of Station KXLS, Alva.

On June 25, 1997, Chisholm filed a Motion to Dismiss Tyler's rulemaking petition, demonstrating that Tyler's proposal should be dismissed because it would deprive Tishomingo of its only local broadcast service, in violation of *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("*Change of Community MO&O*").

II. Tyler's Opposition

In his Opposition, Tyler claims that his petition for rulemaking should be accepted even though it is contingent upon the activation of a new broadcast service at Tishomingo, Oklahoma. Opposition, p. 4. Although Tyler readily admits that it is premature to issue a Report and Order adopting his proposal because Station KTSH is the sole local broadcast service at Tishomingo, Tyler claims that "it is not premature to accept the Petition for processing." *Id.* at 5, citing *Eatonton and Sandy Springs, Georgia, et al.*, 6 FCC Rcd 6580 (Mass Media Bur. 1991) ("*Eatonton*").² Tyler claims that the fact his petition is contingent upon the activation of a new service at Tishomingo "... does not make [his] petition for rulemaking unacceptable any more than the existence of the short spacing made the petition in *Eatonton* unacceptable."³ Opposition, p. 6. Tyler also cites the Report

² As Tyler notes, *Eatonton* involved a rulemaking proposal which was short-spaced to the licensed site of an existing station. On the same day the counterproposal was filed, however, the licensee of the short-spaced station filed an application proposing to move its transmitter to a new site which, if the application was granted, would eliminate the short-spacing. See Opposition, p. 5. Following the grant of that application on November 9, 1990, the Bureau elected to consider the rulemaking proposal. See *Eatonton*, DA 97-1334, ¶3 (Policy and Rules Div., released June 27, 1997).

³ Tyler notes that the application of South Central Oklahoma Christian Broadcasting, Inc. ("South Central Oklahoma"), was filed on January 27, 1997 (File No. BPED-970127MD), and that his rulemaking petition was not filed until March 21, 1997. Opposition, p. 5, n.6.

and Order in *Llano and Marble Falls, Texas*, DA 97-1115 (Allocations Branch, released May 30, 1997), in an effort to further support his claim that a rulemaking petition is acceptable “even though it cannot be granted until a subsequent contingency has occurred” Opposition, p. 6.

III.

Tyler’s Proposal Violates the Procedural Policy Set Forth In *Cut and Shoot, Texas*

Tyler places great reliance on the Bureau’s decision in *Eatonton* for the proposition that the Commission will accept rulemaking petitions contingent upon the occurrence of subsequent events. Tyler fails to acknowledge, however, that long after the Bureau issued its *Notice of Proposed Rule Making* and *Report and Order* in *Eatonton*,⁴ the Commission adopted a procedural policy whereby it no longer will accept contingent rulemaking petitions. In *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (Policy and Rules Division 1996), a rulemaking petition was filed seeking the allotment of a channel to Cut and Shoot, Texas. Although the petitioner’s proposal was fully spaced to an outstanding construction permit for Station KYKR(FM), Beaumont, Texas, the Chief, Policy and Rules Division (“Chief”), affirmed the staff’s return of the rulemaking petition as being technically unacceptable because it was short-spaced to the licensed site of Station KYKR. In doing so, the Chief noted that Section 73.208 of the rules specifies the applicable reference point to be used in determining FM minimum separations as “authorized” transmitter sites, and that, in this situation, both the licensed site and the construction permit site represented authorized sites. Accordingly, the rulemaking proponent was required to meet the minimum separation requirements for both sites. *Id.* at 16384, n.2.

⁴ The *Notice of Proposed Rule Making* in *Eatonton* was released on December 22, 1989 (4 FCC Rcd 8745 (Allocations Branch 1989)), and the *Report and Order* was released on October 25, 1991 (6 FCC Rcd 6580 (Mass Media Bur. 1991)).

The Chief explained his decision by stating that the processing of rulemaking petitions which are contingent upon the actions of third parties in order to effect compliance with the Commission's minimum separation provisions is not "conducive to the efficient transaction of Commission business[,] and imposes unnecessary burdens on the administrative resources of both the Allocations Branch and the Audio Services Division." *Id.* at 16384. The Chief also noted that the facilities set forth in some outstanding construction permits are never built and licensed. Moreover, the Chief stated that if a notice of proposed rulemaking is adopted, and the construction permit upon which it is contingent is subsequently cancelled, the Audio Services Division must notify the Allocations Branch, and the Branch must then dismiss the rulemaking petition and terminate the proceeding, which results in "avoidable and unnecessary expenditures of resources." *Id.* The Chief also recognized that this unnecessary expenditure of resources imposes an unfair burden on parties who have filed comments in the rulemaking proceeding. *Id.*

In addition, the Chief acknowledged that even those facilities which are constructed often are not built and licensed in a timely manner. This, in turn, delays resolution of the rulemaking proceeding because the "contingent" construction permit has not been licensed. The Chief concluded that there is no public interest benefit in such a delay, and that the delay in adopting a Report and Order is "unfair to other parties in the proceeding with proposals that are not contingent on the licensing of facilities set forth in an outstanding construction permit." *Id.*

Despite Tyler's reliance on *Eatonton*, the Bureau's 1991 Order has effectively been overruled by *Cut and Shoot* to the extent it suggests that the Commission will accept petitions for rulemaking contingent upon the actions of third parties in order to effectuate compliance with the Commission's rules. Indeed, in *Cut and Shoot*, the Chief expressly stated:

The staff may have, in some instances in the past, processed rulemaking petitions contingent on the licensing of facilities in an outstanding construction permit. However, in a case such as [this], there is no countervailing public interest sufficient to warrant consideration of a proposal which violates the rule, and we will not do so. *This policy of not accepting petitions for rulemaking contingent on the licensing of facilities set forth in an outstanding construction permit will conserve Commission resources and enable us to process the vast majority of rulemaking proposals which are not contingent on the licensing of facilities authorized in a construction permit.* On balance, we do not believe that it is detrimental to the public interest to have some potential rulemaking proponents await the eventual licensing of facilities set forth in a construction permit before they may file a petition for rulemaking. If and when construction of the modified facilities of [the station] is completed and a license issued, [the petitioner] may resubmit its allotment proposal in full compliance with our rules.

11 FCC Rcd at 16384 (footnotes omitted) (emphasis added).

The contingency regarding the rulemaking proposal in *Eatonton* was the very same contingency that the Policy and Rules Division sought to avoid through adoption of the *Cut and Shoot* policy. As stated above, the subject rulemaking proposal in *Eatonton* was short-spaced to the licensed site of an existing station. Although the Allocations Branch elected to consider the proposal because an application had been filed on the same day proposing to move the station to a fully-spaced site, and that application had been granted, consistent with the concerns expressed in *Cut and Shoot*, the modified facility was never built and the construction permit was subsequently cancelled. Thus, after the filing of an application for review, the Policy and Rules Division properly affirmed the return of the petition because the proposal violated the Commission's spacing provisions and was contingent upon favorable action on an application that had not yet been filed. *Eatonton*, DA 97-1334, ¶¶6-7 (Policy and Rules Div., released June 27, 1997).

The facts in this case are slightly different because Tyler's proposal is not "contingent upon the licensing of facilities in an outstanding construction permit." Nevertheless, the rationale

underlying the Commission's *Cut and Shoot* policy applies with equal force to Tyler's proposal.⁵ However, unlike the situation in *Cut and Shoot* where the contingency essentially concerned only the actual construction of the modified facilities, the contingency regarding Tyler's proposal is greater because there is no guarantee that South Central Oklahoma's application will even be *granted*. Moreover, even assuming, *arguendo*, the application is granted, there is no assurance that the proposed station will be constructed in a timely manner, if at all. *See Cut and Shoot*, 11 FCC Rcd 16384, ¶14. Therefore, if the Commission were to process Tyler's petition and ultimately issue a Notice of Proposed Rule Making, the contingent nature of Tyler's petition not only would result in an "avoidable and unnecessary expenditure of resources" by the Commission and any parties to the rulemaking proceeding, but the proceeding could not be resolved until a new broadcast service is activated at Tishomingo. As determined in *Cut and Shoot*, there is no public interest in such a delay, and it would be manifestly unfair to other parties who may have conflicting proposals that are not contingent upon the activation of a new service at Tishomingo. *Id.*

Finally, Tyler contends that the removal of Tishomingo's only local broadcast service is "not necessarily fatal" to his proposal, and that it is "premature" for him to request a waiver of the prohibition against removing a community's sole local broadcast service at this stage of the proceeding. Opposition, p. 6, n.7. *Cut and Shoot* makes clear, however, that processing rulemaking petitions which are dependent upon the actions of third parties to effect compliance with the FCC's rules is not "conducive to the efficient transaction of Commission business[,] and imposes

⁵ Indeed, the fact that Tyler relies so heavily upon *Eatonton* demonstrates that he recognizes the close factual similarity between the contingent nature of his proposal and that involved in *Eatonton*. Due to the factual identity between *Eatonton* and *Cut and Shoot*, Tyler's reliance on *Eatonton* also supports application of the *Cut and Shoot* policy to his proposal.

unnecessary burdens on the administrative resources of both the Allocations Branch and the Audio Services Division.” *Cut and Shoot*, 11 FCC Rcd at 16384, ¶4. Therefore, despite Tyler’s contentions, it was incumbent upon him to demonstrate in his petition that his proposal satisfies the “rare circumstances” threshold⁶ before asking the Allocations Branch to require the Commission and any eventual parties to the rulemaking proceeding to engage in an “avoidable and unnecessary expenditure” of resources which the Policy and Rules Division sought to avoid by adopting the *Cut and Shoot* policy. Furthermore, it is significant that despite the unnecessary expenditure of resources and indefinite delay that would result from consideration of Tyler’s proposal at this time, Tyler has failed to make *any* showing of how he might be prejudiced if, consistent with *Cut and Shoot*, he is required to resubmit his proposal after the activation of a new service at Tishomingo.

IV. Conclusion

As demonstrated above, acceptance of Tyler’s rulemaking proposal will result in (i) an unnecessary expenditure of substantial resources on the part of the Commission and any parties to the rulemaking proceeding, and (ii) considerable delay because the proceeding could not be resolved until a new local service is activated at Tishomingo. Therefore, for the reasons articulated in *Cut and Shoot*, Chisholm respectfully requests that the Commission return Tyler’s rulemaking petition forthwith, and not permit him to warehouse scarce spectrum indefinitely by filing a rulemaking

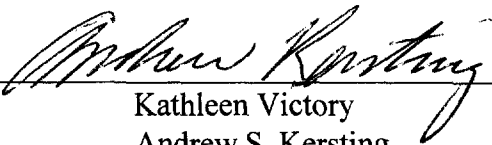
⁶ In its reconsideration order in *Change of Community MO&O*, 5 FCC Rcd 7094 (1990), the Commission clarified that it would entertain requests to waive the prohibition against the removal of an existing station representing a community’s sole local broadcast service in “rare circumstances” where, for example, the proposal would provide “a first reception service to a significantly-sized population.” *Id.* at 7096.

proposal contingent upon the grant of an application and construction of a proposed new station by a third party, neither of which may ever occur. *See Cut and Shoot*, 11 FCC Rcd 16384, ¶4.

WHEREFORE, in light of the foregoing, Chisholm Trail Broadcasting Co., Inc. respectfully requests that the "Petition for Rulemaking and Request for Issuance of Order to Show Cause," filed March 21, 1997, by Ralph Tyler be DISMISSED or RETURNED as unacceptable.

Respectfully submitted,

CHISHOLM TRAIL BROADCASTING CO., INC.

By: 
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Its Counsel

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July 21, 1997

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CERTIFICATE OF SERVICE

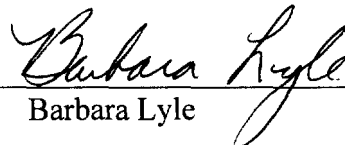
I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 21st day of July, 1997, copies of the foregoing "Reply to Opposition Motion to Dismiss" were hand delivered or mailed first-class, postage pre-paid, to the following:

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